UNITED STATES APPELATE COURT
FOR THE NINTH CIRCUIT

William Price Tedards, Jr.; Monica Wnuk; Barry Hess; Lawrence Lilien; and Ross Trumble, Plaintiffs, v. Doug Ducey, Governor of Arizona, in his official capacity, and Martha McSally, Senator of Arizona, in her official capacity, Defendants.	No. 19-16237 **Plaintiffs-Appellants' Response Showing Cause as to Jurisdiction**

I. Introduction

At the time Plaintiffs filed their notice of appeal, the district court had not yet ruled on their motion for a preliminary injunction (it ruled yesterday, granting the motion to dismiss and denying the motion for a preliminary injunction). But even before yesterday, this Court had jurisdiction under 28 U.S.C. § 1292(a)(1) over an appeal from a *de facto* denial of a preliminary injunction seeking to require a timely special election to fill the vacancy in the Senate created by the death of Senator John McCain. When a district court fails or refuses to rule on a fully briefed motion for a preliminary injunction, and that failure threatens the chance for a meaningful relief from irreparable harm, this Court has jurisdiction. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1449-50 (9th Cir. 1992). The

reasoning being, the failure to rule for an extended period is an effective denial of the preliminary injunction.

Last year, in a case seeking the same relief in a challenge under the Seventeenth Amendment to a Hawaii law denying a timely special election to fill a vacancy in this United States Senate, this Court found that the case had been filed too late for meaningful relief. *Hamamoto v. Ige,* 881 F.3d 719 (9th Cir. 2018). And while the instant challenge was filed *much* sooner than the Hawaii challenge, this Court's instruction in *Hamamoto* that it has the procedures and ability to give expedited review of any future challenge to a long term temporary appointment to fill a Senate vacancy still holds: "[A] suit challenging the appointment of a United States senator raises questions of national importance, and the judicial system has evolved procedures for expediting review of time-sensitive controversies." *Hamamoto,* 881 F.3d at 723.

This case was filed on November 28, 2018 and amended on December 21, 2018. Plaintiffs filed a renewed motion for a preliminary injunction (the subject of this appeal) on December 28, 2018. That motion was fully briefed on January 18, 2019. On February 21, 2019, the district court set a hearing on that motion for April 12, 2019.[1]

[1] While blame has been pinned on Plaintiffs for delaying that hearing date, the record reflects in the Joint Proposed Scheduling Report (Document 42, filed February 7, 2019) that Plaintiffs had broad availability, with a few exceptions,

To summarize: while Plaintiffs are mindful of the heavy docket facing not just the district court in this case, but the district courts (and appellate courts) across the United States, because of the nature of the relief sought in this case, they were compelled to invoke the "evolved procedures for expediting review of time-sensitive controversies" such as in this case, as this Court noted in its last Seventeenth Amendment case. *Hamamoto*, 881 F.3d at 723. Finally, Plaintiffs want to make it clear that they respect the integrity of and time expended by the district court, from whom they recently received an Opinion from which they will likely file a separate appeal, although that appeal will present the same issues of law as this one.

II. Claims on appeal

Plaintiffs bring three constitutional challenges to the State of Arizona's laws and methods used to fill the United States Senate seat that was vacated by the passing of Senator McCain and seek an injunction on each. In Count I, Plaintiffs bring a challenge under the Seventeenth Amendment to Arizona's decision to allow a "temporary" appointee to hold that federal office for twenty-seven months rather than hold a reasonably prompt election, e.g., within one year of the vacancy arising. Furthermore, and as more fully argued in their opening memorandum in support of their motion for a preliminary injunction, Plaintiffs contend that the

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including two days in which counsel was unavailable because he was arguing before this Court in Seattle.

language, history, and purpose of the Seventeenth Amendment warrants interpreting its vacancy procedures in accord with those governing vacancies in the House of Representatives.

In Count II, Plaintiffs again invoke the Seventeenth Amendment as well as the Elections Clause in challenging A.R.S. 16-222 for allowing the Arizona Legislature to *require* rather than "empower" the Governor to make a temporary appointment to the office of United States Senator. Plaintiffs contend that under the Elections Clause, the legislature has authority to set neutral procedural regulations for a special election but may not make a substantive policy decision to prefer a temporary appointee of the Governor over a Senator elected by the people beyond the period that the vacancy can be filled in an orderly special election.

Finally, in Count III, Plaintiffs raise claims under the Elections Clause, Qualifications Clause, and First Amendment by challenging the requirement of A.R.S. 16-222 that the temporarily-appointed United States Senator (currently Senator Martha McSally) be of the same political party as the Senator who was elected to the seat (in this case, Senator John McCain).

These claims all involve irreparable injury for which there is no adequate legal remedy. *Rodriguez v. Robbins,* 715 F.3d 1127,1144-45 (9th Cir. 2013)("the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

Furthermore, there is compelling precedent in favor of Plaintiffs' position that an election must be held to fill the Senate vacancy temporarily filled by Senator McSally. *Judge v. Quinn*, No. 10-2836, 2008 U.S. App. LEXIS 28077 (7th Cir. Sep. 24, 2008)(upholding injunction requiring special election to fill Senate vacancy).

III. This Court has jurisdiction over the appeal

Faced with the precedent set by this Court in *Hamamoto v. Ige,* Plaintiffs have filed this appeal in order to ensure that their claims – which seek a special election for a United States Senate seat – are not mooted. *See Hamamoto v. Ige,* 881 F.3d 719 (9th Cir. 2018)(Seventeenth Amendment challenge mooted by passage of time); *Mount Graham Red Squirrel,* 954 F.2d at 1449-50 (appellate court has jurisdiction over appeal where district court delay in ruling on preliminary injunction amounted to effective denial as a result of changes to facts on the ground).

And here, further delay in ruling on Plaintiffs' preliminary injunction motion would: (1) have the practical effect of refusing that injunction (seeking a special election) and (2) as highlighted in *Hamamoto*—will at some point moot the claims in the case which if meritorious constitute irreparable injury. *See, Rodriguez v. Robbins,* 715 F.3d 1127,1144-45 (9th Cir. 2013)("the deprivation of constitutional

rights 'unquestionably constitutes irreparable injury.'"); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

Under circuit precedent, this Court has jurisdiction over the appeal because further delay in issuing an opinion deciding Plaintiffs' motion for a preliminary injunction seriously risks mooting the claim, *i.e.*, at some point it will become impracticable to order the special election Plaintiffs seek in their pending motion. *Mount Graham Red Squirrel*, 954 F.2d at 1449-50 (9th Cir. 1992)(appellate court has jurisdiction over appeal where district court delay in ruling on preliminary injunction amounted to effective denial as a result of changes to facts on the ground).

While this particular invocation of jurisdiction under 28 U.S.C. § 1292(a)(1) is not standard, it is well grounded not only in the above cited Ninth Circuit precedent, and not only in the leading treatise cited to therein (*Wright & Miller*), but in precedent from the Supreme Court on down. *See*, *Carson v. Am. Brands*, 450 U.S. 79, 84, (1981)(discussing jurisdiction); *Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 703 (3d Cir. 1991) ("we conclude that the May Order's deferral of consideration of the preliminary injunction application was an effective denial of that application."); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161 (4th Cir. 1977)("We think the indefinite continuance amounted to the refusing of an injunction and is appealable as such under 28 USC § 1292(a)."), *cert. denied*,

434 U.S. 1047 (1978); *United States v. Lynd*, 301 F.2d 818, 822 (5th Cir. 1962)(where trial court "did not grant the order his action in declining to do so was in all respects a 'refusal,' so as to satisfy the requirements of Section 1292, 28 U.S.C.A."). Appellate jurisdiction on these terms may be invoked infrequently, but it is well grounded in law.

As highlighted in the *Hamamoto* opinion, Plaintiffs faced the risk that a delay in ruling on their preliminary injunction, without any indication that a ruling was forthcoming, would put their ability to gain relief at severe and immediate risk. For that reason, they filed this appeal, and for that reason, this Court has jurisdiction.

Conclusion

Controlling precedent is clear that where a case may become moot as a result of delay – however justified – in ruling on a motion for preliminary injunction, an appeal may be taken directly to the Court of Appeals. Precedent is also clear that where elections to national office are at stake, there are procedures to ensure that there is timely review of constitutional claims seeking such elections. Therefore, and considering this Court's precedent in the *Hamamoto* case, Plaintiffs respectfully ask that this Court recognize its jurisdiction and expedite their appeal.

Respectfully Submitted,

Dated: June 28, 2019

By: /s/ Michael Persoon
One of Plaintiffs' Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully Submitted,

Dated: June 28, 2019

By: /s/ Michael Persoon
One of Plaintiffs' Attorneys

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Declaration of Michael P. Persoon

1. My name is Michael P. Persoon.

2. I am an attorney admitted to practice before the United States Court of Appeals for the Ninth Circuit.

3. I am an adult over the age of 18, a citizen of the State of Illinois and of the United States of America, and a resident of Cook County, Illinois.

4. I make this declaration in connection with establishing the jurisdiction of the Ninth Circuit over the appeal in the case, *Tedards, et. al v. Ducey, et. al.* (19-16237).

5. After filing the notice of appeal in this case, I had separate phone calls with counsel for both defendants on Thursday, June 20, 2019.

6. On both calls, I asked counsel if their clients would waive the defense of mootness.

7. Counsel for Governor Ducey would not agree to waive the defense of mootness.

8. Counsel for Senator McSally would not agree to waive the defense of mootness.

9. I make the foregoing statement subject to penalty of perjury or other penalty as provided by Illinois law.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: 25 June 2019

Michael P. Persoon